



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Departments of the Army and the Air Force,
National Guard Bureau--Reconsideration
File: B-224838.2
Date: June 1, 1987

DIGEST

Proper basis exists for canceling invitation for bids after bid opening and a decision sustaining a protest of the agency's rejection of a bid on other grounds where a contracting agency reviewing official determines the items are not needed and denies necessary approval of the procurement. Prior decision finding the protester entitled to bid preparation costs and costs of pursuing the protest therefore is modified to delete entitlement to bid preparation costs since the protester could not have received the award.

DECISION

The Departments of the Army and the Air Force, National Guard Bureau requests reconsideration of our decision, MZP, Inc., B-224838, Feb. 11, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 150, sustaining the protest of MZP, Inc. under invitation for bids (IFB) No. DAHA04-86-B-0030. We amend our prior decision.

The IFB was issued in July 1986 for the installation of fencing at the Army National Guard Training Center, Camp Roberts, California. The agency rejected MZP's bid because the affidavits of the individual sureties supporting MZP's bid bond did not include up-to-date financial statements. In response to the protest the agency subsequently decided that it should not have rejected the bid and that in fact MZP submitted the low responsive bid. The agency reported, however, that it could not make award to MZP because the project had been approved for fiscal year 1986 funding, and adequate funding might not be available in fiscal year 1987. We held that if award is made to MZP, no further action is necessary but if award is not made to MZP, then MZP should be paid its bid preparation costs and the cost of pursuing its protest since it would be deprived of a contract that it properly should have received.

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In its request for reconsideration, the agency states that the procurement lacked required approval and therefore no award could have been made to MZP under the IFB. The agency explains that its internal regulations required approval from a higher command for any award exceeding \$50,000. The approval was not requested prior to issuance of the IFB because the contracting activity's estimate was less than \$50,000, but all responsive bids, including MZP's, exceeded \$50,000. When it was clear that the award would exceed \$50,000, the activity requested the requisite approval. The reviewing official ultimately denied the request after our decision was issued. The basis for the denial was that erecting the fencing would serve no practical purpose since existing or less costly measures could provide comparable security.

The agency contends that since no award could have been made to MZP at its bid price, we should revise our decision to dismiss MZP's protest. In this regard, the agency points out that the approval review was conducted without reference to any bidder and was not related to MZP's protest. The agency alternatively requests that we modify our decision and delete our conclusion that MZP is entitled to reimbursement of its bid preparation costs and the costs of pursuing the protest. -

We agree that based on facts not available at the time of our prior decision, the decision should be modified. An agency properly may cancel an IFB after bid opening where the IFB was issued in good faith but the agency subsequently discovers the items solicited do not satisfy a legitimate need; this is so even if the agency arguably could have discovered the basis for cancellation earlier had it acted more diligently. See Able Fence and Guard Rail Inc., B-223380, Sept. 4, 1986, 86-2 CPD ¶ 259. In view of the fact that the approving authority here decided that the contracting agency does not need fencing, the IFB is therefore to be canceled. The improper rejection of MZP's bid thus did not deprive that firm of a contract it should have received. Further, there is no indication that the National Guard Bureau originally issued the IFB in bad faith. Therefore, we no longer have any basis on which to allow the recovery of bid preparation costs. Asbestos Abatement of America, Inc., B-221891, et al., May 7, 1986, 86-1 CPD ¶ 441.

This does not, however, affect the protester's entitlement to bid protest costs. At the time of our decision the agency had not yet determined that a basis existed for canceling the IFB, and on the record had improperly rejected MZP's bid. Further, the agency had not advised us that the procurement was subject to approval by a reviewing official

such that a decision might be premature. Our decision sustaining the protest therefore was correct at the time it was issued and under the standard for award of costs the protester was entitled to its protest costs. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) and (e) (1986). The agency's belated recognition that the procurement was subject to approval that ultimately was not forthcoming should not, in our judgment, now be seen as a basis for denying the protester the protest costs to which it was entitled. We therefore modify our decision only to delete the conclusion that MZP is entitled to reimbursement of its bid preparation costs.

We affirm our prior decision as modified.

for Milton J. Parker
Comptroller General
of the United States